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No. 10-1171

In the Supreme Court of the United States

LINDA A. THOMAS,

Petitioner,

v.

STATE OF LOUISIANA,
DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether someone who was convicted of a misdemeanor and sentenced to one year of probation, yet never challenged her conviction via direct appeal, state-court collateral attack, or federal habeas petition, is barred from attacking her sentence for the first time in a civil lawsuit by the rule of *Heck v Humphrey*, 512 U.S. 477 (1994), and by analogous but independent state tort law principles.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 3

I. THIS CASE PRESENTS A POOR VEHICLE FOR ADDRESSING WHETHER *HECK* SUPPORTS AN "IMPOSSIBILITY EXCEPTION." 4

A. Petitioner's claims are separately barred on state tort law grounds. 4

B. Petitioner's lack of diligence in challenging her conviction means she could not profit from any "impossibility exception" to *Heck*. 7

1. *The precise terms of the circuit disagreement do not apply to petitioner's situation.* 7

2. *Petitioner's failure to challenge her conviction while in custody forecloses any access to a putative "impossibility exception" to* Heck 9

II. *Heck* cannot support an "impossibility exception." 13

Conclusion 19

TABLE OF AUTHORITIES

Cases

Agner v. City of Hermosa Beach, 315 F. App'x 29 (CA9 2008) 2

Beckway v. DeShong, 717 F. Supp 2d 908 (N D. Cal. 2010) 10

Blunt v. Becker, 2010 WL 570489 (N.D. Ill. Feb 16, 2010) 2

Bradshaw v. Jayaraman, 205 F 3d 1339 (CA6 1999) 2, 5

Coleman v. Thompson, 501 U.S. 722 (1991) 18

Childs v. King County, 116 Wash. App. 1067 (Wash Ct. App. 2003) 2

Christy v. Sheriff of Palm Beach County, Fla., 288 F. App'x 658 (CA11 2008) 8

Cohen v. Longshore, 621 F 3d 1311 (CA10 2010) 3, 11, 15

Cunningham v Gates, 312 F.3d 1148 (CA9 2002) 12

DeWalt v. Carter, 224 F.3d 607 (CA7 2000) 16

Domotor v. Wennet, 630 F. Supp. 2d 1368 (S.D. Fla. 2009) 8, 12

Entzi v. Redmann, 485 F.3d 998 (CA8 2007) .. 16, 17

Ex parte Royall, 117 U.S. 241 (1886) 18

Figueroa v. Rivera, 147 F.3d 77 (CA1 1998) 17

Gauger v. Hendle, 349 F 3d 354 (CA7 2003)..... 2

Gausvik v. Perez, 239 F. Supp. 2d 1108 (E D. Wash. 2002)..... 2

Gray v. Kinsey, 2009 WL 2634205 (N.D. Fla. Aug. 25, 2009)..... ... . 8, 12

Guerrero v. Gates, 442 F.3d 697 (CA9 2006) 7, 11

Hainze v. Richards, 207 F.3d 795 (CA5 2000)..... .. 3

Haring v. Prosise, 462 U.S. 306 (1983). 6

Harrison v. State Through Dept. of Pub. Safety & Corrs., 721 So. 2d 458 (La. 1998).... . 5

Heck v. Humphrey, 512 U.S. 477 (1994) ....passim

Hill v. City of Chicago, 2007 WL 1424211 (N.D. Ill. May 10, 2007)..... 2

Hoard v. Reddy, 175 F.3d 531 (CA7 1999)..... . 8, 11

Imbler v. Pachtman, 424 U.S. 409 (1976) 14

Jean-Laurent v. Hennessy, 2008 WL 5274322 (E.D.N.Y. Dec. 18, 2008)..... 12

Jones v. Camden Police Dept., 2010 WL 3489021 (D.S.C. Aug 13, 2010)..... 6

Jones v. Cunningham, 371 U S. 236 (1963)... 10

Kroncke v. Vaca, 2009 WL 3165448 (Ariz. Ct. App Oct 1, 2009) 6

Lamar v. Beymer, 2005 WL 2464178 (W.D. Ky. Oct. 4, 2005) 2

Lee v. Stickman, 357 F.3d 338 (CA3 2004) 10

Leroy v. Great Western United Corp, 443 U S. 173 (1979) 7

Malden v. City of Waukegan, 2009 WL 2905594 (N.D. Ill. 2009) 8

Marshall v. Downey, 2010 WL 5464270 (E D.N.Y. Dec. 27, 2010) 6

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986) 14

Mitchell v. Dep't of Corr., 272 F Supp 2d 464 (M.D. Pa. 2003) 11

Montelongo v. City of Phoenix, 2009 WL 73665 (D. Ariz. Jan. 9, 2009) 2

Morrow v. Federal Bureau of Prisons, 610 F 3d 1271 (CA11 2010) 8

Nance v. Vieregge 147 F.3d 589 (CA7 1998) 12

Nonnette v. Small, 316 F.3d 872 (CA9 2002) 7

Powers v. Hamilton County Public Defender Comm'n, 501 F.3d at 601 12

Randell v. Johnson, 227 F.3d 300 (CA5 2000)..... 16

Restrepo v Fortunato, 556 So 2d 1362 (La. Ct. App. 1990)..... 5

Roe v. Graham, 2010 WL 4916328 (E.D. Ark. Nov. 23, 2010)..... 2

Schwartz v. New Mexico Corr. Dept. Prob & Parole, 384 F. App'x 726 (CA10 2010)..... 10

Skinner v. Switzer, 131 S.Ct. 1289 (2011) 14

Soos v. Mitchell, 2010 WL 3985037 (C D. Cal. June 11, 2010)..... 12

Spencer v. Kemna, 523 U S. 1 (1988) 8, 9, 13, 16

Wallace v. City of Chicago, 440 F.3d 421 (CA 7 2006).. 2

Wesbecher v. Landaker, 2008 WL 2682614 (E.D. Cal. July 1, 2008) 11

Wilson v. Johnson, 535 F.3d 262 (CA4 2008)..... 16

Wolfe v. Perr, 412 F.3d 707 (CA6 2005)... 6

Rules

SUP. CT R. 15 2 4

Statutes

28 U.S.C § 2244(d)(1) 13

28 U.S.C. § 2254... 15

28 U S.C. § 2254(a)..... 10

42 U.S.C. § 1983 .....passim

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-17a) is published at 406 F. App'x 890. The district court's order (App. 18a-26a) is not published in the Federal Supplement, but is available at 2010 WL 2217003.

JURISDICTION

Respondent accepts petitioner's jurisdictional statement.

STATEMENT

Petitioner was terminated from her job with respondent on November 1, 2007 because she had improperly authorized food stamp benefits for her friends and family. Pet at 7. She was arrested shortly thereafter on charges of felony theft and malfeasance of office *Id* at 8.

In October 2008, while those charges were still pending, petitioner filed suit against respondent in Louisiana state court. Her complaint alleged discriminatory retaliation in violation of Title VII and also included state-law claims of false arrest and false imprisonment. Respondent removed the case to federal district court, that court stayed the matter pending resolution of the criminal charges. *Id.*

On September 16, 2009, petitioner was convicted of misdemeanor theft. She was sentenced to a short period of imprisonment (she ultimately served 14 days in jail), along with a fine, restitution, and one year of supervised probation. *Id.*; App. 3a. Petitioner does not appear to have

appealed the conviction or otherwise sought state collateral relief, and she did not file a federal habeas petition during her one-year probation.

After lifting the stay, the district court granted summary judgment to respondent on all claims. App. 19a-26a. The court did not specifically detail its grounds for dismissing the false arrest and false imprisonment claims. On appeal, the Fifth Circuit accepted respondent's argument that petitioner's state-law claims were barred by *Heck*. App. 14a-15a. This application of *Heck* to state-law claims appears to reflect a minority approach,[1] but is

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[1] Most courts treat *Heck* as applying only to federal claims. *See, e.g., Gauger v. Hendle*, 349 F.3d 354, 362 (CA7 2003) (holding that *Heck* did not apply to claims under Illinois law), *rev'd on other grounds, Wallace v. City of Chicago*, 440 F.3d 421 (CA 7 2006), *Bradshaw v. Jayaraman*, 205 F.3d 1339 (CA6 1999) (table) (reversing dismissal of state-law claims under *Heck* because the state supreme court had not adopted the reasoning in *Heck*), *Roe v. Graham*, 2010 WL 4916328, at *1 (E.D. Ark. Nov. 23, 2010) (declining to apply *Heck* to state-law claims); *Montelongo v. City of Phoenix*, 2009 WL 73665, at *2 (D. Ariz. Jan. 9, 2009) (holding that *Heck* did not apply to state-law claims), *Hill v. City of Chicago*, 2007 WL 1424211, at *5 (N.D. Ill. May 10, 2007) (same), *Lamar v. Beymer*, 2005 WL 2464178, at *12 (W.D. Ky. Oct. 4, 2005) (same), *Gausvik v. Perez*, 239 F. Supp. 2d 1108, 1123 (E.D. Wash. 2002) (same); *Childs v. King County*, 116 Wash. App. 1067, *6 (Wash. Ct. App. 2003) ("*Heck* involved interpretation of a federal statute, it does not apply to causes of action under state law"), *but see Blunt v. Becker*, 2010 WL 570489, at *5 (N.D. Ill. Feb. 16, 2010) (dismissing federal and state wrongful imprisonment claims under *Heck*). Some state courts have explicitly incorporated *Heck* into state law, *see Agner v. City of Hermosa Beach*, 315 F. App'x 29, 30 (CA9 2008) (noting that California applies *Heck* principles to state-

consistent with circuit precedent. *See Hainze v. Richards*, 207 F 3d 795, 799 (CA5 2000) (applying *Heck* to bar state-law claims based on the same premise as constitutional claims under 42 U.S.C. § 1983).

REASONS FOR DENYING THE PETITION

Although this case is a poor vehicle for resolving it, petitioner correctly notes a profound circuit split about the meaning of *Heck v. Humphrey*, 512 U.S 477 (1994). *See* Pet. at i. The split concerns whether *Heck*—which categorically bars section 1983 actions that necessarily implicate the invalidity of a criminal conviction or sentence—contains an "impossibility exception" for plaintiffs who cannot challenge their convictions through federal habeas. *See generally Cohen v. Longshore*, 621 F.3d 1311, 1315 (CA10 2010) (canvassing split). The contours of the split are neither as clear nor as lopsided as petitioner claims, *see infra* part I.B 1, but the divergence is deep and this Court should resolve it in a future case

Not in this one, though. As the court of appeals noted, petitioner's state-law tort claims were barred not only by *Heck* but also on independent state grounds. App. 14a n.4 Moreover, because of petitioner's lack of diligence in challenging her conviction while in custody--she did not even directly appeal it, for instance--she would not qualify for the putative exception to *Heck* that she

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law claims), but the Louisiana Supreme Court does not appear to have done so

asks this Court to recognize. *See infra* parts I.A & I.B.

Apart from those vehicle problems, however, respondent briefly outlines *infra* its disagreement with petitioner on the merits. *See* SUP. CT. R. 15.2 (requiring brief in opposition to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted"). *Heck*'s categorical bar does not support an "impossibility exception." The Court should not accept petitioner's invitation to commit the same error already made by several courts of appeal—namely, to ignore both the language and reasoning of *Heck* in favor of *dicta* in scattered opinions that would alter *Heck*'s rationale and undermine its protection of the integrity of state criminal convictions. *See infra* part II.

I. THIS CASE PRESENTS A POOR VEHICLE FOR ADDRESSING WHETHER *HECK* SUPPORTS AN "IMPOSSIBILITY EXCEPTION."

A. Petitioner's claims are separately barred on state tort law grounds.

Petitioner brought her false arrest and false imprisonment claims under Louisiana law, not section 1983. App. 18a. The Fifth Circuit held that these claims were barred by *Heck*. App. 14a. But the court also held that petitioner's state-law claims failed independently of *Heck*. Specifically, the court correctly held that the torts of false arrest and false imprisonment both required petitioner to show she was detained unlawfully, and that she

could not do so under Louisiana law because she had been convicted of the crime for which she was arrested and imprisoned. App. 14a n.4 (citing *Harrison v State Through Dept. of Pub. Safety & Corrs.*, 721 So. 2d 458, 465 n.9 (La. 1998) and *Restrepo v. Fortunato*, 556 So. 2d 1362, 1363 (La. Ct. App. 1990)).

Thus, regardless of whether *Heck* applies to this case, petitioner's conviction would still preclude her claims as a matter of *state* law.[2] Petitioner cannot account for this flaw in her petition, and simply dismisses the reasoning behind the alternate state-law holding as "circular." Pet. at 11 n.2. But petitioner then engages in her own circular reasoning, asserting that because she is trying to prove the unlawfulness of her arrest and imprisonment in *this suit*, her claims cannot be barred by state law. *Id.* This logically incoherent argument is flatly contradicted by numerous decisions dismissing state-law claims on the same

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[2] Even though, as a practical matter, the lack of a favorable termination in this case would serve to bar both federal and state claims, differences in state laws mean that this will not always be the case. For instance, in *Bradshaw*, the Sixth Circuit affirmed the district court's dismissal of federal claims under *Heck*'s favorable termination rule, but reversed its dismissal of the plaintiff's state-law legal malpractice claim because Tennessee law permits malpractice actions before a conviction has been overturned. 205 F 3d at 1339, *see also Williams v. City of Medford*, 2010 WL 5789000, at*5-6 (D Or Nov. 16, 2010) (noting that Oregon law was unclear on whether a criminal conviction would always preclude a later damages claim for false arrest)

grounds as the Fifth Circuit did in this case.[3] *See, e.g, Wolfe v Perr*, 412 F.3d 707, 719 (CA6 2005) (applying *Heck* to federal claims, but affirming grant of summary judgment on state-law false arrest and malicious prosecution claims due to a finding of probable cause); *Marshall v. Downey*, 2010 WL 5464270, at *8 (E.D.N.Y. Dec. 27, 2010) (ruling § 1983 malicious prosecution claim was barred by *Heck*, but dismissing state-law version of claim because plaintiff's failure to show a favorable termination was a "fatal flaw in a malicious prosecution claim under . . . state tort law."); *Jones v. Camden Police Dept.*, 2010 WL 3489021, at *3 (D.S.C Aug 13, 2010) ("Even if Plaintiff's claims for false arrest and false imprisonment are not barred by *Heck*, he fails to show that he was falsely arrested or falsely imprisoned."); *Kroncke v. Vaca*, 2009 WL 3165448, at *1 n.2 (Ariz Ct. App. Oct. 1, 2009) (affirming dismissal on grounds that federal claims were barred by *Heck* and analogous state-law claims were precluded by underlying conviction).

Because petitioner's claims would fail under state law regardless of this Court's resolution of the question presented by petitioner, this case does not present an appropriate vehicle for the Court's review of that question. *See, e.g., Haring v. Prosise*, 462 U S 306, 314 n. 8 (1983) (noting that "a

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[3] Moreover, as discussed in part I B, *infra*, the proper avenues for petitioner to challenge her conviction were a state appeal, state post-conviction review, and, if unsuccessful, a federal habeas petition She inexcusably failed to pursue these remedies.

challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181, n. 11 (1979) (explaining that "it is not our practice to re-examine state-law determinations of this kind").

B. Petitioner's lack of diligence in challenging her conviction means she could not profit from any "impossibility exception" to *Heck*.

1. The precise terms of the circuit disagreement do not apply to petitioner's situation.

Petitioner correctly notes that the courts of appeals are divided on whether the *Heck* bar applies to plaintiffs who are no longer in custody She claims that seven circuits—the Second, Fourth, Sixth, Seventh, Ninth, Tenth and Eleventh—recognize an exception for such plaintiffs, whereas four—the First, Third, Fifth, and Eighth—do not. Pet. at 13-19. But petitioner's characterization of a neatly defined, seven-to-four split is inaccurate

The Ninth Circuit, for example, has acknowledged only a limited exception to *Heck* for "former prisoners challenging loss of good-time credits, revocation of parole or similar matters, [but] *not* challenges to an underlying conviction." *Guerrero v. Gates*, 442 F.3d 697, 705 (CA9 2006) (quoting *Nonnette v. Small*, 316 F 3d 872, 878 (CA9 2002)) (emphasis added). And the Seventh Circuit has clarified that while there is "probably" an exception to *Heck* where "no route other than a

damages action under section 1983 is open to the [plaintiff] to challenge his conviction," *Heck* nonetheless bars relief where, as here, a plaintiff had the option of pursuing a direct appeal or some form of collateral attack in the state courts. *Hoard v. Reddy*, 175 F.3d 531, 533 (CA7 1999) (applying *Heck* where plaintiff could access state postconviction remedies); *see also Malden v. City of Waukegan*, 2009 WL 2905594, at *13-14 (N.D. Ill. 2009) (noting the possibility of a *Heck* exception as an open question in the circuit, but characterizing the *Spencer* concurrences as noncontrolling dicta). Finally, the Eleventh Circuit reiterated as recently as 2008 that it has "expressly declined to consider that issue ... where the § 1983 action is otherwise barred under *Heck*." *Christy v. Sheriff of Palm Beach County, Fla.*, 288 F. App'x 658, 666 (CA11 2008); *see also Domotor v. Wennet*, 630 F. Supp. 2d 1368, 1380-81 (S.D. Fla. 2009), and *Gray v. Kinsey*, 2009 WL 2634205, at *8 (N.D. Fla. Aug. 25, 2009) (declining to apply impossibility exception).[4]

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[4] Petitioner contends that "any doubt in [the Eleventh Circuit] is most likely put to rest" by *Morrow v. Federal Bureau of Prisons*, 610 F.3d 1271, 1272 (CA11 2010). But *Morrow* did not purport to answer the question for the circuit, as emphasized by the separate concurrence arguing that the court *should* adopt the position espoused by Justice Souter in *Spencer*. See 610 F.3d at 1273-74 (Anderson, J., concurring). Moreover, the plaintiff's claims in *Morrow* "in no way implie[d] the invalidity of his conviction or of the sentence imposed by his conviction," *id.* at 1272, and thus would not have been barred by *Heck* anyway. See *Heck*, 512 U.S. at 487 ("the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence").

Thus, while the lower courts are without question deeply divided over *Heck*, it is unlikely that the Fifth Circuit's position reflects a minority view. But regardless of the breakdown of the split, there is no split at all on the question of whether *Heck* applies to plaintiffs who *are* in custody and have *not* attempted to satisfy the favorable termination requirement. That is the scenario here: as discussed *infra*, petitioner was in custody—serving a short prison sentence followed by one year of probation—during the pendency of her district court case, but she made no attempts to invalidate the conviction through a direct appeal, state collateral review, or federal habeas review

2. *Petitioner's failure to challenge her conviction while in custody forecloses any access to a putative "impossibility exception" to* Heck.

Petitioner argues that *Heck* should not bar civil rights claims where the circumstances of the conviction render federal habeas relief impossible. Pet. at 24. In doing so, she espouses the *Heck* concurrence's reasoning that individuals who are not "in custody" for habeas purposes—because, for instance, they were merely fined or served a short term of imprisonment—should not have to "show the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment." *Heck*, 512 U.S. at 500 (Souter, J., concurring). Yet even if the Court were to adopt the position of the *Heck* and *Spencer* concurrences and announce an impossibility exception (which it should not do),

petitioner *could not benefit from it* because she *was* in custody at the time of her lawsuit and did not attempt to appeal her conviction or seek habeas relief.

Petitioner was convicted of misdemeanor theft on September 16, 2009, and sentenced to a short prison term (14 days served) followed by twelve months' supervised probation. Pet. at 8; App. 2a. Petitioner was thus "in custody" for habeas purposes for the full year of her probation—until approximately October 2010. *See* 28 U.S.C. § 2254(a) (providing that federal courts may entertain habeas petitions from persons "in custody pursuant to the judgment of a State court"); *Jones v. Cunningham*, 371 U.S. 236, 242 (1963) (explaining that "custody" extends beyond physical confinement and encompasses other "significant restraints on ... liberty" that are "not shared by the public generally"); *Lee v Stickman*, 357 F.3d 338, 342 (CA3 2004) ("It is ... clear that being on probation meets the 'in custody' requirement for purposes of the habeas statute."). Petitioner thus cannot seriously argue that it would have been "impossible" for her to obtain habeas relief during this period. *See Schwartz v. New Mexico Corr. Dept. Prob. & Parole*, 384 F. App'x 726, 730-31 (CA10 2010) (applying *Heck* bar where plaintiff had approximately three months of probation remaining when he filed his lawsuit and "could therefore have brought his selective prosecution claim in a habeas action"); *Beckway v. DeShong*, 717 F. Supp. 2d 908, 928 (N.D. Cal. 2010) (holding that impossibility exception did not apply to

plaintiff who was "in custody" by virtue of a one-year probation sentence).[5]

No circuit has held that a former prisoner who had the opportunity to challenge her sentence but failed to do so can later avoid the *Heck* bar because habeas is no longer available. In fact, as petitioner acknowledges, most of the circuits to have recognized some sort of impossibility exception have nonetheless barred claims "by individuals who did not diligently seek relief while incarcerated." Pet. at 15; *see, e.g.*, *Cohen v. Longshore*, 621 F.3d 1311, 1316-17 (CA10 2010) ("If a petitioner is unable to obtain habeas relief—*at least where this inability is not due to the petitioner's own lack of diligence*—it would be unjust to place his claim for relief beyond the scope of § 1983...." (emphasis added); *Guerrero*, 442 F.3d at 705 ("Guerrero cannot now use his 'failure timely to pursue habeas remedies' as a shield against the implications of *Heck*.").[6] And even in cases—unlike this one—

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[5] See also *Wesbecher v. Landaker*, 2008 WL 2682614, at *4 (E.D. Cal. July 1, 2008) (holding, in *Heck* context, that "plaintiff's release from custody does not render moot any habeas proceedings challenging his underlying criminal conviction because, by his own admission, he remains under parole supervision and continues to suffer collateral consequences stemming from that conviction"), *Mitchell v. Dep't of Corr.*, 272 F. Supp. 2d 464, 480 (M.D. Pa. 2003) (holding that plaintiff could not "defeat the intent and specific requirements of habeas and *Heck*'s favorable termination requirement by waiting to file for damages just before his release").

[6] *See also Hoard*, 175 F.3d at 533 (holding that *Heck* exception applies only where "no route other than a damages action under section 1983 is open to the person to challenge

where federal habeas relief is truly unavailable, courts still apply the favorable termination requirement unless plaintiffs have diligently pursued state appellate or postconviction remedies. *See, e.g., Nance v. Vieregge* 147 F.3d 589, 591 (CA7 1998) (no exception from *Heck* where plaintiff had options of seeking a pardon from the governor or a writ of coram nobis); *Gray*, 2009 WL 2634205 at *9 (applying *Heck* where, "[d]espite the unavailability of federal habeas relief, the plaintiff [was] not without a remedy to seek relief from his conviction through appeal of the traffic conviction.").[7]

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his conviction," and not where habeas or state postconviction relief was available), *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d at 601 (holding that a plaintiff would not be "entitled to such an exception if the plaintiff could have sought and obtained habeas relief while still in prison but failed to do so"), *Cunningham v. Gates*, 312 F.3d 1148, 1153 n. 3 (CA9 2002) ("We decline to hold that Cunningham's failure timely to pursue habeas remedies takes his § 1983 claim out of *Heck*'s purview.")

[7] *See also Domotor v. Wennet*, 630 F. Supp. 2d 1368, 1380 (S.D. Fla. 2009) (explaining that "to allow the Plaintiff to circumvent applicable state procedures and collaterally attack her convictions in federal court [would pose] the precise situation that *Heck* seeks to preclude") (internal quotation marks omitted); *Jean-Laurent v. Hennessy*, 2008 WL 5274322, at *1 (E.D.N.Y. Dec. 18, 2008) ("[A]lthough the Second Circuit has recognized an exception in Section 1983 actions under *Heck* if a plaintiff was unable to pursue a *habeas* petition and satisfy *Heck* because he was no longer in custody, that exception does not apply to Jean-Laurent because he failed to file a direct appeal of his state court conviction and failed to file a timely habeas petition."); *cf. Soos v. Mitchell*, 2010 WL 3985037, at *5 (C.D. Cal. June 11, 2010) (holding, where plaintiff was subject to a fine and was not in custody for

In sum, nothing about this case implicates a concern that petitioner has been "bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for [her] to satisfy." *Spencer*, 523 U.S. at 21 (Souter, J., concurring) There is no indication in the petition or the record below that petitioner appealed her conviction or otherwise sought state postconviction relief. Nor did she file a federal habeas petition, even though she was "in custody" for an entire year.[8]

Petitioner's claims thus plainly would not fall within any sort of "impossibility exception," even if the Court were to take the inadvisable step of creating one. Like the independent state-law ground problem discussed in part I.A, *supra*, the exception's inapplicability demonstrates that this petition is not a suitable vehicle for addressing the persistent circuit disagreement over the meaning of *Heck*.

II. *HECK* CANNOT SUPPORT AN "IMPOSSIBILITY EXCEPTION."

Apart from the vehicle problems with her petition, petitioner's view of *Heck*—and her

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habeas purpose, that "since Plaintiff diligently sought appellate relief of his conviction and is precluded from seeking habeas relief through no fault of his own *Heck* does not bar his § 1983 claim ")

[8] Indeed, because the statute of limitations for federal habeas corpus petitions is one year, petitioner not only *could* have filed her petition during the course of her probation, but was *required to do so* for the petition to be timely 28 U S C. § 2244(d)(1) Nothing about the circumstances of petitioner's year-long probation offers her an excuse for failing to do so.

corresponding view of how the Court should resolve the persisting circuit disagreement over *Heck*—are both wrong. *See* Pet. at 24-28. Recognizing the "impossibility exception" that several circuits have concocted would fundamentally undermine *Heck* by divorcing the decision from its common-law roots, and would thus remove the protections *Heck* erected for the integrity of state criminal processes.

The "[p]athmarking" decision in *Heck*, *see Skinner v Switzer*, 131 S.Ct. 1289, 1298 (2011), held that a tort suit premised on the invalidity of a state conviction or sentence is not cognizable under 42 U S C. § 1983. *Heck*, 512 U S at 487 (holding that a section 1983 damages claim premised on an "allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, .. *is not cognizable under § 1983*") (emphasis added). *Heck* reached that conclusion about the scope of section 1983 by consulting the statute's animating background in common-law tort principles. *Id.* at 483 (explaining that "to determine whether there is any bar to the present suit, we look first to the common law of torts") (citing *Memphis Community Sch. Dist. v. Stachura*, 477 U S. 299, 306 (1986)).[9] The Court held that,

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[9] *Heck* thus follows other decisions in which the Court has measured the scope of section 1983 against its common-law background. For instance, the Court has recognized that the statute's otherwise unqualified language must be read to include qualified and absolute immunity *See Imbler v Pachtman*, 424 U.S. 409, 418-19 (1976) (discussing recognition of absolute and qualified immunity, given that "§ 1983 is to be read in harmony with general principles of tort

because common-law tort actions were "not appropriate vehicles for challenging the validity of outstanding criminal judgments," neither could an action lie under section 1983 that would "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S at 486. Such an action, the Court carefully explained, would survive dismissal only if the plaintiff proves that

> the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Id. at 486-87.

Several circuits have ignored this plain holding—and the reasoning undergirding it—by engrafting an "impossibility exception" onto *Heck*. *See, e.g., Cohen*, 621 F.3d at 1315 (discussing exception); *see also supra* part I.B.1 (discussing circuit split); *but see, e.g., Entzi v. Redmann*, 485 F.3d 998, 1003 (CA8 2007) (holding that *Heck* expressly rejected an impossibility exception).

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immunities and defenses rather than in derogation of them") Similarly, the Court has explained that the statute's historical context "compels the conclusion" that it excludes vicarious liability *Monell v. Dep't of Social Serv's*, 436 U.S. 658, 691 (1978), *see also, e.g., Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011) (confirming that "local governments . are not vicariously liability under § 1983 for their employees' actions").

These courts draw on language from Justice Souter's *Heck* concurrence and from opinions concurring and dissenting from the majority opinion in *Spencer v. Kemna*, 523 U.S. 1 (1988). *See, e.g., DeWalt v. Carter*, 224 F.3d 607, 617 (CA7 2000) (drawing on *Spencer* opinions); *but see Randell v. Johnson*, 227 F.3d 300, 301-02 (CA5 2000) (rejecting reliance on *Spencer* and "declin[ing] to announce for the Supreme Court that it has overruled one of its decisions"). The exception would generally allow a section 1983 plaintiff to circumvent the *Heck* bar "when it is no longer possible to meet [*Heck*'s] favorable termination requirement via a habeas action." *Wilson v. Johnson*, 535 F.3d 262, 267 (CA4 2008).

These courts have fundamentally misread *Heck*. First, any impossibility exception to *Heck*'s bar is foreclosed by *Heck* itself. The *Heck* majority opinion noted, *and expressly rejected*, Justice Souter's alternative reading. *See Heck*, 512 U.S. at 490 n.10 (observing that Justice Souter would not apply the bar to cases "involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges"). The majority responded to Justice Souter in clear terms:

> We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal in no longer incarcerated.

Id.; *see also, e.g., Entzi*, 485 F.3d at 1003 (noting this same language from *Heck* to reject any impossibility exception).

Second, as the quoted language indicates, *Heck*'s rejection of an impossibility exception is not *dictum*—rather, it necessarily flows from *Heck*'s rationale and is therefore inseparable from its holding. *See, e.g., Entzi*, 485 F.3d at 1003 (identifying this language as part of *Heck*'s holding); *Figueroa v. Rivera*, 147 F.3d 77, 81 (CA1 1998) (identifying the principle as part of *Heck*'s "core holding"). This, again, is plain on the face of *Heck*. The majority rejected Justice Souter's gloss not on mere policy grounds, but rather because it would have "abandon[ed]" the basic principle underlying *Heck*—*i.e.*, "the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction." 512 U.S. at 490 n 10.[10]

Third, the examples typically put forward to justify an impossibility exception fail to do so, and would themselves undermine the core of *Heck*. Thus, for instance, it is said that section 1983 must be available to a plaintiff who has been fined or sentenced to a short term of confinement, because under those circumstances federal habeas is not

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[10] Incredibly, petitioner buries any mention of this language—language which is part of *Heck*'s core holding and which expressly rejects the same exception which she asks this Court to recognize—in a footnote. *See* Pet. at 26 n 9 (observing that "other language in the Court's opinions may cast doubt on this conclusion") (citing *Heck*, 512 U.S. at 490 n.10).

available. *See, e.g.*, *Heck*, 512 U.S. at 500 (Souter, J., concurring) (noting similar examples); Pet. at 24 (same). But this line of reasoning ignores what *Heck* actually held. A person who has been fined or sentenced to a short term—and who therefore may lack access to federal habeas—may nonetheless overcome the *Heck* bar by proving his conviction or sentence has been

- "reversed on appeal,"
- "expunged by executive order," or
- "declared invalid by a state tribunal authorized to make such determination[.]"

512 U.S. at 486-87.

In other words, *Heck* expressly recognized that a putative section 1983 plaintiff might have to rely on *state* processes to establish the invalidity of his underlying conviction or sentence. Consequently, an impossibility exception based solely on a lack of access to *federal* habeas would simply rewrite *Heck*. Unlike the "impossibility exception," *Heck* itself contains no naked preference for federal oversight before a plaintiff may wield civil rights laws to attack his outstanding state conviction. *Cf. Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (observing that "[u]nder our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution'") (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)).

In some future case—soon, we hope—the Court should reject the "impossibility exception"

concocted by several circuits for the simple reason that it eviscerates *Heck*. *Heck* did not turn on a situation-specific appraisal of whether federal habeas relief was available in a given case. Rather, *Heck* categorically delineated the substantive scope of a section 1983 action attacking a criminal conviction or sentence.[11] To make that determination, *Heck* drew on the "principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence"—to bar *all* section 1983 actions attacking a criminal conviction or sentence that has not been previously set aside. 512 U.S. at 490 n.10. The Court should take some future case to reassert that principle against the numerous circuits who continue to undermine it and, along with it, the integrity of state criminal processes. This case is a poor vehicle for doing so, however.

CONCLUSION

The petition for certiorari should be denied.

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[11] *See, e.g.*, *Heck*, 512 U.S. at 483 (identifying issue to be decided as "whether the claim is *cognizable* under § 1983 at all"); *id.* at 489 (explaining that "[w]e .. deny the *existence* of a cause of action [under section 1983]"), *id.* at 490 (explaining that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated") (emphases added)

Respectfully submitted,

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